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June 1, 2004

Ms. Laurie Allen, Chief
Marine Mammal Conservation Division
Office of Protected Resources
NMFS (F/PR2)
1315 East-West Highway
Silver Spring, MD 20910
via facsimile (301.427.2516)

**RE: Marine Mammal Protection Act of 1972; Notice of Proposed
Rulemaking for the Zero Mortality Rate Goal, 69 FR 23477.**

Dear Ms. Allen:

Please accept these comments on the Proposed Rule for the Zero Mortality Rate Goal (ZMRG) on behalf of the Garden State Seafood Association (GSSA)(See 69 FR 23477). The GSSA is comprised of a diverse group of fishing related businesses operating primarily in the State of New Jersey. The GSSA membership includes companies involved in all aspects of the fish and seafood industry, including commercial fishing, gear supply & dock operations, processing, importing/exporting, and restaurant/retail market operations.

Members of GSSA support ongoing efforts to minimize unintended accidental interactions with marine mammals. GSSA members do not condone unnecessary incidental injury or mortality of marine mammals. Many members of GSSA are veterans of the MMPA Take Reduction Team process and work via cooperative research initiatives to better understand and mitigate marine mammal and protected species interactions to the maximum extent feasible. Accordingly, we offer the following substantive comments on the Proposed Rule for the ZMRG.

Any definition of a ZMRG insignificance threshold rate should be contingent on available technology and economics of the fishery(s), consistent with the origin of the statute

The ZMRG concept was developed in 1972 to specifically address the mammal interactions occurring in the ETP yellowfin tuna purse seine fishery. The standard operating procedure by participants in that fishery was to successfully exploit the natural relationship between tuna and dolphin by directly encircling schools of dolphin. The dolphin mortality associated with this practice precipitated the need for the ZMRG (See 68 FR 40889).

According to the history of the statute, Congress never intended to use the ZMRG to "shut down or significantly curtail the activities of the fleet" if the tuna fishermen were using the best available technology to minimize the hazards to dolphins. (See 68 FR at 40889). Clearly, the provision was originally intended to address a specific activity in a specific fishery, the plausibility of which was linked directly to the availability of gear research and technology.

In 1981, Congress went so far as to indicate that the ZMRG requirement was satisfied in the yellowfin tuna fishery based on the continued application of mammal safety technology (See H.R. Rep. No. 97-228 at 17; and 68 FR 40889). Similarly, Congress chose not to extend the ZMRG for other fisheries because the necessary technology was not available. The ZMRG remained in MMPA section 101(a)(2) merely "to stimulate new technology for reducing the incidental taking of marine mammals" (See H.R. Rep. No. 97-228 at 17-18; and 68 FR 40889).

Based on the history of this statute, the definition of the ZMRG insignificance threshold must directly incorporate available technology and economic feasibility components into an assessment of whether or not the fishery(s) has achieved the ZMRG. It is not in our mind, sufficient to merely *refer* to the MMPA requirements in Section 118(f)(2) that require the Secretary to take these elements into account but rather to link the two as clear components in the definition of a ZMRG insignificance threshold.

A restrictive definition of the ZMRG insignificance threshold is biologically unnecessary

A restrictive definition of the ZMRG insignificance threshold is biologically unnecessary for mammal stocks to achieve the main objectives of the MMPA. The main objectives of the MMPA are "to protect and encourage marine mammals to develop to the greatest extent feasible commensurate with sound policies of resource management" such that they do not "cease to be a significant functioning element of the ecosystem of which they are a part" and "they do not diminish below their optimum sustainable population (OSP)" U.S.C. 1361(2);(6).

The Potential Biological Removal (PBR) is calculated to ensure that mammal stocks achieve/maintain OSP with 95 percent probability. The PBR is defined as "the

maximum number of animals not including natural mortalities that may be removed from a marine mammal stock while allowing that stock to reach or maintain its optimum sustainable population." (See 16 U.S.C. Sec. 1362(20)). The statute contains no specified time requirement for when a stock must achieve OSP. Thus, from a rigorous scientific standpoint PBR is sufficient - there is no need for the addition of a restrictive insignificance threshold to ensure that mammal stocks achieve/maintain OSP.

Though the agency minimized the conservatism built into the PBR calculation as "common misrepresentation" (see 69 FR 23481), we note the agency's response to the comments received pursuant to the ANPR failed to enumerate the use of the "safety" or recovery factor (i.e. F_r). The only purpose of this component is to compensate for uncertainty resulting from unknown estimation error. The net effect for most stocks is a 50-percent reduction in the value of PBR. Thus, a multi-tiered precautionary approach is in fact incorporated into each and every PBR calculation to account for uncertainty and ensure that mammal populations achieve OSP levels at least 95-percent of the time. Clearly, the PBR calculation negates the scientific justification for a precautionary definition of the ZMRG insignificance threshold.

Specific comments on the proposed ZMRG insignificance threshold equal to 10% of PBR


The GSSA offers the following recommendations on the Proposed Rule for the ZMRG insignificance threshold:

- The proposed ZMRG threshold is unnecessary for marine mammal stocks to achieve OSP and should be redrafted by the agency as a stimulant for technology, rather than a conservative, rigidly defined point-specific objective;
- The ZMRG threshold should be directly contingent on the best available practical technology and fishing practices, consistent with the original intent of the statute;
- Consistent with the original intent and policy of Congress in 1972, the ZMRG threshold should not be defined in such a manner that it can be used to shut down or significantly curtail the activities of commercial fishing;
- The application of the ZMRG should be prioritized by the Secretary for stocks that have small known population size, those that are declining most rapidly, and those stocks whose level of incidental mortality and serious injury have not dropped significantly within 5 years of Take Reduction Plan implementation;
- If technology is deemed not available and a fishery is determined to be above the ZMRG after 5 years under an approved plan, then the Secretary should work with fishery participants to develop and implement the appropriate technology;
- ZMRG should not be applicable to robust stocks, stocks that are severely endangered (i.e. $PBR = < 5.0$ individuals), or stocks not under an MMPA management program;
- The GSSA is opposed to the choice of Option I (10% of PBR) because it: (1) is based on overly precautionary N_{min} and PBR calculations; (2) is not directly contingent on available practical technology and economic feasibility; (3) is based on a conservative MMC definition of "negligible impact" that is no more

scientifically defensible than other percentage of PBR (i.e. why not 11%, 13.75%, 15% or 20.02% of PBR?); (4) may lead to overly precautionary restrictions for mammal stocks with low PBRs; (5) seeks to maintain stocks at unreasonably high levels (i.e. 95%-98%) of the estimated range (i.e. 60%-100%) of carrying capacity; and (6) appears to be favored by the agency more for familiarity and philosophical reasons than for scientific rigor.

On behalf of the members of the Garden State Seafood Association, thank you for the opportunity to comment on the Proposed Rule for the ZMRG insignificance threshold.

Respectfully submitted,



Rick E. Marks

Director of Government Affairs